No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS BRIEF OF NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATIONAL GROCERS ASSOCIATION, AND NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITIONER FOOD MARKETING INSTITUTE

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are retail trade associations whose members are directly affected by the ruling below. The Eighth Circuit's ruling, applying its version of the D.C. Circuit's nebulous *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) standard, would require *amici*'s members to disclose highly sensitive, confidential sales information at a level of granularity that would harm members' ability to compete in an already highly competitive industry. *Amici* support the petition because this case illustrates the tenuous protections afforded confidential information under *National Parks* and the attendant need to return to the plain language of the Freedom of Information Act's ("FOIA") Exemption 4. *Amici* submit this brief to help the Court understand the significant measures they take to protect the information at issue and to amplify the reasons for granting the petition.

Founded in 1961, the National Association of Convenience Stores (NACS) is a non-profit trade association today representing more than 2,500 retail and 1,600 supplier company members nationwide. NACS is the preeminent representative of the interests of convenience store operators. In 2017, the fuel wholesaling and convenience industry employed approximately 2.5 million workers and generated $601.1 billion in total sales.

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1. Pursuant to Supreme Court Rule 37, amici curiae state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel contributed money that was intended to fund preparing or submitting the brief. Amici gave timely notice of their intention to file this brief, and the parties have consented in writing to the filing of this brief under Rule 37(b).

The National Grocers Association (NGA) is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food distribution industry. Independent retailers are privately owned or controlled food retail companies operating in a variety of formats. They are responsible for generating $131 billion in sales, 944,000 jobs, $30 billion in wages, and $27 billion in taxes. The NGA appeared as amicus in the Eighth Circuit in support of petitioner's appeal.

The National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, "Main Street" merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the significant driver of the American economy, supporting 42 million working Americans and contributing $2.6 trillion to the annual GDP. As an association representing the interests of the vital retail industry, NRF advocates for fairness and opportunity for all sectors of retail, no matter their size. NRF regularly advocates for the interests of retailers, large and small, before the legislative, executive, and judicial branches of government.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant FMI's petition and restore the interpretation of FOIA Exemption 4 to its plain language. The record below illustrates the lengths to which retailers go to protect sales data like the individual store-specific Supplemental Nutrition Assistance Program ("SNAP")

redemption data at issue in this case. Applying the plain meaning of Exemption 4, retailers' reasonable efforts to protect against the disclosure of same-store sales data should be enough to satisfy the statute's "confidential" requirement.

Yet *National Parks* has long applied a judicial gloss that unnecessarily limits the protections afforded to private parties who provide confidential data to the federal government to assist it in carrying out its manifold functions. That judicial gloss, which requires the submitter to demonstrate the likelihood that substantial competitive harm will occur from disclosure, sets Exemption 4 apart from many other areas of law that *presume* harm from the disclosure of confidential business information. It also imposes an unreasonable burden on both the submitter of confidential data and the agency FOIA officers, who are not well positioned to assess competitive harm across the range of industries affected by FOIA requests.

This case illustrates the arbitrariness of the *National Parks* standard. The court of appeals denied protection to a retailer's sensitive SNAP data where other courts of appeals, applying their own version of the test, would likely have found the exemption to apply. This Court should grant certiorari to correct what Justice Thomas has called an "atextual test" that has strayed far from the protections afforded by Congress. *New Hampshire Right to Life v. Dep't of Health & Human Servs.*, 136 S. Ct. 383, 385 (2015) (dissenting from denial of certiorari).

ARGUMENT

I. This Court should grant the Petition to protect confidential information in accord with the plain language of FOIA Exemption 4.

FOIA's Exemption 4 is one of several (like Exemption 6) designed to protect private information in the hands of the government. Congress enacted FOIA to provide a means for citizens to know about the activities of their *government*. At the same time, Congress realized that the goal of governmental transparency does not justify unfettered access to *private* information, the public release of which could harm legitimate public and private sector interests. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Exemption 4 thus affords protection to those persons who provide sensitive information to the federal government, while also seeking to ensure that the government has access to the information necessary to perform its broad functions. By its plain terms, Exemption 4 prohibits the disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

The deterrent effect of haphazard government disclosure on a private business's decision to share sensitive information cannot be gainsaid. Exemption 4 reflects the common-sense principle that "[u]nless persons having information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired." *National Parks*, 498 F.2d at 767.[2]

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2. Under the auspices of *stare decisis*, the D.C. Circuit (in *Critical Mass*, *infra* at 6) amended its *National Parks* standard

Given the government's perpetual need for massive amounts of private, commercial data, there are significant incentives to hew close to the plain language of Exemption 4. Under the ordinary meaning of "confidential," the expectations of the party producing the information are essential to determining FOIA's protections. As this Court has concluded in interpreting the identical term elsewhere in FOIA, "confidential" is "not limited to complete anonymity or secrecy." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 173 (1993) (construing FOIA Exemption 7). Thus, one would have expected courts to adopt a plain meaning definition of the statute's protection for confidential information—*i.e.*, information that is "communicated *in confidence*" or "*intended* to be held in confidence or kept secret." WEBSTER'S SECOND INT'L DICTIONARY 560 (1937) (emphasis added & alterations omitted)).

But as is apparent from this case, for the last forty years, the lower courts have strayed well beyond the common understanding of "confidential" in Exemption 4. The D.C. Circuit's *National Parks* standard, which two members of that court later criticized as "fabricated, out of whole cloth," *Critical Mass Energy Project v. NRC*, 931 F. 2d 939, 947 (D.C. Cir. 1991) (Randolph, J., concurring), restricts the statute's confidentiality protections. Eschewing the common understanding of "confidential," *National Parks* adopted a standard that protects information only where disclosure would "likely cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d

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to create a different test for *voluntarily* produced information, as compared to information produced to the government under compulsion. Yet the statute does not suggest any such different treatment for voluntarily produced or compelled information.

at 770 (emphasis added). As Justice Thomas explained in dissent from denial of certiorari in *New Hampshire Right to Life*, this has led to confusion regarding how to answer *National Parks*' "amorphous" questions. 136 S. Ct. at 384-85.

The Petition offers an ideal vehicle to lay to rest "an atextual test that has different limits in different circuits." *Id.* at 385. The Eighth Circuit's application of *National Parks* exposes retailers to unfettered disclosure of their individual store-level sales data—data which they go to great lengths to keep secret and which would provide meaningful information to actual and potential competitors in both local and regional markets. Exemption 4 was designed to prevent just this sort of misuse of federal disclosure laws. Yet *National Parks* has transformed FOIA into a weapon in the commercial war for market dominance.[3]

A. SNAP store-level redemption data should fall under Exemption 4 because food retailers treat such information as private and confidential.

To protect their market shares and maintain profitability, food retailers have always treated their SNAP store-level redemption data, like all of their

3. A 2017 analysis of FOIA requests "found that public-oriented inquiries by concerned citizens and their advocates account for only a small fraction of the 700,000-plus FOIA requests submitted each year." Elizabeth Williamson, *Businesses Turn to Public Record Requests as Weapons Against Their Critics*, N.Y. Times, Nov. 6, 2018, at A13 (quotations omitted). "The bulk of requests come from businesses seeking to further their own commercial interests by learning about competitors." *Id.* (quotations omitted).

individual store sales data, as highly confidential. Across the food retail industry, stores regularly implement and enforce policies and procedures to maintain the secrecy of their SNAP redemption data. According to NGA's CEO Peter Larkin, a store's sales information, including SNAP redemption data, is not publicly available and is confidential, closely guarded information. (Doc. 185 at 250:25-251:10.)[4] Mr. Larkin explained that such information is not typically known "beyond just a couple of people." (Doc. 186 at 17:1-13.)

The record is replete with statements by key personnel in the industry that they have always kept their store-level sales information, including SNAP redemption data, on a strict "need-to-know" basis. A senior executive at Cumberland Farms, Inc., a convenience store chain in the Northeast, testified that less than 5% of its employees have access to the company's SNAP redemption data, and disclosure of that data outside the company requires a nondisclosure agreement. (Doc. 59-11 at 6.) Dyer Foods, which operates 13 stores in small towns in Tennessee, keeps SNAP redemption data "private" because once you "figure out where the sales are, then [you] go after [that market] a little bit harder." (Doc. 185 at 173:16-22, 195:18-20; *see also* Doc. 119 at 9:19-12:12 (describing Sears Holding Management Corporation's measures to maintain confidentiality of sensitive business information, including store-level sales).)

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4. "Doc." cites herein are to the district court docket on PACER, *Argus Leader Media v. U.S. Dep't of Agric.*, Case No. 4:11-cv-4121-KES (D. S.D.) (Sioux Falls).

Moreover, electronic benefit transfer (EBT) processors, which handle the processing of SNAP transactions, are duty bound to safeguard the secrecy of SNAP redemption data. Each state contracts with an EBT processor to administer SNAP benefits for citizens of that state. Benefit recipients swipe their electronic payment cards (on which SNAP benefit amounts are loaded) at the point of sale ("POS") device in the retailer's store, and the details of the purchase are transmitted to the EBT. The EBT confirms the retailer is an authorized SNAP-participant, checks the amount of benefits available, and instantly transmits an approval (or denial) to the retailer. (Doc. 118 at 7:14-8:18, 9:23-10:10.)

The agreements between states and their EBT processors include strict confidentiality provisions directed at retailer information, such as store-level SNAP redemption data, that EBT processors are required to send to USDA. For instance, Arkansas's EBT agreement provides:

> The Contractor must treat all Information, and *in particular* information relating to *retailers*, all applicants for and recipients of human services ... and providers of such services ..., which is obtained by it through its performance under the Contract, as *private or confidential information* ... and shall restrict access to and disclosure of such Information in compliance with federal and state laws and regulations.

(Doc. 186 at 4 (trial exh. 202, at pp. 17-18) (emphasis added).) The agreement specifically prohibits the EBT from using any such information "in *any* manner except

as necessary for the proper discharge of its obligations." (*Id.* at 17 (emphasis added).)

This strict confidentiality also carries over to third-party researchers retained by retailers to handle a store's sales data. "Retailers are often reticent to provide sales data because they are concerned this data could be used by their competitors to gain an advantage, an understandable concern given the tight margins of food retailers." Molly De Marco, Ph.D., et al., *A Researcher's Checklist for Working with Sales Data to Evaluate Healthy Retail Interventions*, DUKE-UNC USDA CTR. FOR BEHAVIORAL ECON. & HEALTHY FOOD CHOICE RESEARCH, at p.4 (June 2017), available at https://becr.sanford.duke.edu/research-hub/becr-briefs. "Because of this very salient concern to retailers, it is essential to explain how the research team will keep a retailer's sales data ... secure and confidential." *Id.* NACS itself collects and publishes extensive industry information for the benefit of its members, "but not before an extraordinary degree of aggregation and anonymization." (Doc. 59-11 at 15 (members provide their sensitive financial information "on the explicit and repeated condition that it will be kept 'completely' and 'strictly' confidential").)

Food retailers' efforts to maintain the secrecy of their store-level sales information reflect the fact that competition in the retail food marketplace has been fierce for decades, and continues to increase with pressure from superstores, drug stores, warehouse clubs, and small format/limited assortment grocery stores. The introduction of internet-based food delivery services has only heightened that competition. The result is that, for food retailers, average net (pre-tax) profits are under one

percent. (Doc. 139-1 at 3; Doc. 186 at 11:23-12:7; Doc. 185 at 205:12-206:8 (describing food retailers' "razor-thin" margins).)

A retailer's customer base is a valuable asset built over many years by providing excellent customer service and developing in-depth understanding of customer preferences and trends. With tight profit margins, retailers use all available tools to maintain and expand their customer base and revenues, often at the expense of competitors. As trial testimony demonstrated, there is a "relatively inelastic amount of dollars in any given market that are available for food at home," and when a new store succeeds in taking away SNAP business, "[i]t has to be at somebody's expense." (Doc. 186 at 27:10-16, 30:11-16.)

Food retailers protect and expand their business by, among other things, seeking to ascertain competitors' private store sales data. Food retailers know that if competitors discern this data, those competitors can more readily secure a foothold in a local market and target the customers of existing retailers. Every bit of information about competitors' sales helps form a clearer picture of a store's bottom line. As these proceedings showed, the volume of a target store's SNAP redemptions helps competitors derive more accurate estimates of that store's *overall* sales.[5]

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5. Doc. 59-11 at 16 ("[R]etailer-specific transactional data from SNAP sales could be combined with other existing public information ... to reasonably approximate total gross revenues for [that] retailer."); Doc. 59-13 at 7 ("The SNAP redemption data could also provide our competitors with insight with respect to individual Kmart stores' profits."); Doc. 185 at 180:21-25, 192:11-16 (knowing a store's SNAP sales data is "helpful" and can give

All of this leads to a simple conclusion: "There is *no place* where [competitors] can get the actual data" of a store's SNAP sales. (Doc. 186 at 32:3-4 (emphasis added).) Thus, retailers participate in SNAP with the expectation that their store-level redemption data be kept confidential. (*E.g.*, Doc. 59-10 at 1-2, Doc. 59-12 at 1-2, Doc. 59-16 at 2-3, Doc. 59-17 at 1-2, Doc. 59-18 at 1-2.) As one witness put it, "when our members signed up for the program, they *always* felt that it was confidential, private, and it was *never* going to be released." (Doc. 186 at 32:5-7 (emphasis added).) Under the plain meaning of "confidential," food retailers' reasonable expectations of confidentiality should be enough to warrant the protections of Exemption 4.

B. Applying the plain meaning of "confidential" is consistent with the law of unfair competition.

When an information submitter has taken reasonable steps to protect is data as "confidential," there should not be the additional requirement that the submitter prove that the public disclosure of its data will likely cause "substantial competitive harm" (words that do not appear anywhere in the statute). Applying the plain meaning of "confidential" will bring Exemption 4 in line with the many other areas of law where courts protect confidential data without requiring a demonstration of harm.

There is a long-standing presumption of irreparable harm in business tort claims, especially when confidential and proprietary business information is made available to,

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a competitor "a better estimate" of its total sales); *id.* at 196:7-8 (SNAP redemption data gives competitors a "back door into determining what your sales are").

or exploited by, competitors and other market participants. Thus, "[o]ver the years, courts have often ruled that a trade secret claimant is entitled to a rebuttable presumption of irreparable harm for the purposes of injunctive relief ... without regard to proof of a measurable economic injury." 4 Robert M. Milgrim & Eric E. Bensen, *Milgrim on Trade Secrets* § 15.02[1][c] (2018). Under many states' laws, in light of the many precautions that retailers take to safeguard disclosure (*supra* at 7-10),[6] store-level SNAP data would qualify as a trade secret.[7]

Similarly, once a plaintiff has demonstrated a likelihood of success on the merits of a copyright infringement claim, irreparable harm is presumed.

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6. "[A] trade secret proprietor need not take extreme measures; reasonable precautions will suffice." 3 Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks & Monopolies* § 14:26 (4th ed. 2017) (courts consider "the existence ... of an express agreement restricting disclosure," efforts to "prevent acquisition of the information by unauthorized parties," the circumstances under which the information was disclosed, and the extent to which they give rise to a reasonable inference that further disclosure ... is prohibited," and "the degree to which the information has been placed in the public domain").

7. *E.g.*, *Allied Waste Servs. of N. Am., LLC v. Tibble*, 177 F. Supp.3d 1103, 1112 (N.D. Ill. 2016) (noting that trade secrets include "sales data"); *PFS Distrib. Co. v. Raduechel*, 492 F. Supp.2d 1061, 1082 (S.D. Iowa 2007) ("The fact PFS published its annual sales volume on its website does not prevent plaintiffs from claiming the other data used by [defendants], such as ... customer-specific sales figures, are in fact trade secrets."); *Yeiser Research & Dev. LLC v. Teknor Apex Co.*, 281 F. Supp.3d 1021, 1046 (S.D. Cal. 2017) ("sales data may constitute a trade [secret] if it is not readily ascertainable from a public source but instead developed with a substantial amount of time, effort, and money").

4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14:06[A] (Matthew Bender rev. ed. 2018). Irreparable injury is also presumed in federal and common law unfair competition cases involving trade name infringement, trade dress infringement, passing off, and general acts of unfair competition. *E.g.*, *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612 n.3 (9th Cir. 1989) ("In trademark infringement or unfair competition actions, once the plaintiff establishes a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive relief is not granted.").

The absurdity of *National Parks*' "substantial competitive harm" standard is perhaps best illustrated by a hypothetical from the employment context. Consider a food retail executive who has access to the very same confidential store sales data, who has signed a confidentiality agreement and accepted related restrictions on post-employment activities. The law *presumes* irreparable harm if that executive seeks to use that information for the benefit of a competitor after separating from employment.[8] Even without evidence of harm, courts will protect an employer's confidential business information with the invasive remedy of an injunction to prevent further breaches by the former employee. "[D]amage from the breach is presumed to be irreparable and the remedy at law is considered inadequate. It is not necessary to show actual damage by instances of successful competition, but it is sufficient

8. *See, e.g.*, *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1231 (11th Cir. 2009) ("[t]he violation of an enforceable restrictive covenant creates a presumption of irreparable injury"); *Overholt Crop Ins. Serv. Co. v. Travis*, 941 F.2d 1361, 1371 (8th Cir. 1991) (same).

if such competition, in violation of the covenant, may result in injury." 43A C.J.S. *Injunctions* § 95. In those instances, "breach is the controlling factor and injunctive relief follows almost as a matter of course." *A.E.P. Indus. v. McClure*, 302 S.E.2d 754, 762 (N.C. 1983) (finding injunctive relief appropriate where sales representative had access to "confidential ... prices, sales and financial information"). In fact, courts will enter injunctions preventing a former employee from going to work for a competitor based on the mere *threat* of an improper disclosure.[9]

The reasoning behind this principle is patent: a party threatened with irreparable harm should not have to suffer the harm *before* being entitled to injunctive relief. There is very little reason to apply a different principle when a retailer provides the same information to a government agency. The retailer should not have to put on days of expert evidence demonstrating the substantiality of impending harm to be entitled to invoke Exemption 4.

C. The *National Parks*' test puts retailers at a significant procedural disadvantage when invoking Exemption 4.

By abandoning the plain language of FOIA and disregarding the inherent harm in public disclosure of private sector confidential business information, the

9. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995) ("inevitable" breaches of non-disclosure agreement may be enjoined in case of a "fierce beverage-industry competition"); *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500, 505 (5th Cir. 1982) (injunctive relief where defendant was working in position for competitor "that would create an inherent threat of disclosure").

National Parks test often leaves businesses without an adequate opportunity to protect such sensitive information in FOIA proceedings. First, there is a serious time crunch when attempting to prove Exemption 4. When notified of a FOIA request as required by Executive Order 12600, retailers must try to prove to the agency that substantial competitive harm is likely to result from disclosure of each type of confidential information covered by the request, and they must try to do this before the 20-day statutory deadline for the agency's response to the requester.[10]

Second, agency FOIA officers are ill-equipped to digest the vagaries of the case law across the circuits—as described by FMI in its Petition (at 24-28)—or apply the facts to that law in predicting the likelihood of substantial competitive harm. Line-drawing as to what is "substantial" and what is not is necessarily subjective, and the government officials making those calls often

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10. 5 U.S.C. § 552(a)(6)(A) requires agencies to make determinations on FOIA requests within twenty working days, and limits extensions of that time period to "unusual circumstances." *Id.* § 552(a)(6)(B). As one author explained:

> Difficult enough to meet for ordinary FOIA requests, these deadlines are often entirely unrealistic in cases involving business records, in which it is often not only necessary to review bulky documents page by page, but to notify the submitter, await a written presentation of its views, and consider those views in light of complex technical and legal questions before arriving at an initial determination that can be communicated to the requester.

Russell B. Stevenson, Jr., *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*, 34 ADMIN. L. REV. 207, 245 (1982).

have no real industry knowledge. *See* U.S. Dep't of Justice Freedom of Information Act Guide, *Exemption 4, Competitive Harm Prong of* National Parks, 2005 WL 6339534, at *2 (Jan. 1, 2005) ("FOIA Guide") ("Courts have repeatedly rejected competitive harm claims—and even have ordered disclosure—when those claims were advanced by agencies on their own."). Such ill-informed decisions will necessarily result in the government setting industry norms for what business information should be afforded protection, inevitably negating legitimate (and costly) efforts by the private sector to secure protections. (*Supra* at 7-10.)

In contrast, determining whether a submitter took reasonable measures to protect its confidentiality is a simpler, more manageable task for government officials, who themselves are required to follow strict protocols to guard against the release of sensitive (perhaps classified) information. As evident from the plain language of Exemption 4, Congress desired this simplicity. A submitter is in position to provide—on short notice—ample evidence to establish that it protects information as secret. There is no need to march in lawyers and experts to hypothesize what third parties might do with the information if they got their hands on it.

But *National Parks*' "substantial competitive harm" test requires businesses to consider the possibility of time-consuming and costly trials to protect their data each and every time they provide information to the government. Submitters must provide substantial pre- and post-decisional evidentiary support of "competitive harm" for *favorable* agency decisions, but also be prepared to challenge *unfavorable* agency decisions in the district

courts under the APA's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). Businesses often do not have the resources to provide such a costly defense whenever their confidential data is implicated in a FOIA request.

Moreover, all these expenditures of company resources and legal fees are often in vain, because the *National Parks* test yields inconsistent and unpredictable results.[11] *See* FOIA Guide, at *2-4 (different outcomes in cases with similar fact patterns, sometimes resulting from "balancing" extraneous factors such as the "public interest").[12] As the DOJ's FOIA Guide recognizes, "[t]he courts have tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines." *Id.* at *2.

Nor is this private sector damage merely an occasional, tolerable side effect of fostering public access

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11. Businesses responding to agencies seeking an explanation as to why the information sought is "confidential" will often not know what court they may end up in, and thus, will not know which circuit formulation of *National Parks*' "substantial competitive harm" test will apply. *See* 5 U.S.C. § 552(a)(4)(B) (FOIA's general venue provision permitting suit in district in which the complainant resides, or has his principal place of business; where the agency records are situated; or the District of Columbia); *see also infra* at 20-21 (summarizing various circuit tests).

12. Although the D.C. Circuit appeared to reject the use of such "balancing" in *Public Citizen Health Research Group v. Food & Drug Administration*, 185 F.3d 898 (D.C. Cir. 1999), other courts still engage in it, *e.g.*, *Utah v. U.S. Dep't of Interior*, 256 F.3d 967, 971 (10th Cir. 2001) ("we note that the State makes a strong public policy argument in favor of a rough 'balancing of interests' test under Exemption Four").

to government information under FOIA. Each year, thousands of FOIA requests implicating Exemption 4 are submitted to federal agencies. USDA agencies alone applied Exemption 4 more than 400 times in 2017. *See* USDA 2017 Annual FOIA Report, Table V.B.(3); *see also, e.g.*, U.S. DOD 2017 Annual FOIA Report, Table V.B.(3) (989 Exemption 4 cases); U.S. DOL 2017 Annual FOIA Report, Table V.B.(3) (3,686 Exemption 4 cases).[13] Expecting thinly staffed FOIA offices to validly perform all of these competitive harm assessments without abusing their vaguely defined discretion is unrealistic. As a result, the courts are annually burdened with hundreds of cases challenging the results of these assessments, either via *de novo* trials (as in the instant case) or via APA review on the basis of wholly inadequate administrative records (in "reverse-FOIA" cases).[14]

Allowing agencies to apply a straightforward "confidentiality" test—determining that the submitter took reasonable measures to protect the secrecy of the information—would also "serve a pragmatic function, encouraging participation in activities that involve the collection of sensitive information." NAT'L RESEARCH COUNCIL, *Studies of Welfare Populations: Data Collection & Research Issues*, ch. 8, at 230-31 (The Nat'l Academies Press 2001), available at https://www.nap.edu/read/10206/chapter/10. As explained above, as part of their daily operations, SNAP participants implement internal policies

13. These Tables can be found at https://www.foia.gov/reports.html (last visited November 9, 2018).

14. The DOJ's own guide on Exemption 4 alone cites (at least) 20 reverse-FOIA decisions in which courts *denied* protection to a business's confidential business information. *Supra* at 16.

and procedures to ensure their confidential business information is kept secret and does not end up in the hands of their competitors. If food retailers know that those same measures are enough to ensure protection from disclosure under Exemption 4, they will be more inclined to participate in SNAP. *See id.* ("Guarantees of confidentiality are considered essential in encouraging participation in potentially stigmatizing programs."). If the decision below stands, however, some SNAP participants may withdraw, hurting USDA's ability to effectively administer the program.[15]

II. The court of appeals' amorphous "substantial competitive harm" standard merits review.

Retailers' consistent and substantial measures to protect the confidentiality of store-level SNAP redemption data should be enough to satisfy Exemption 4's plain meaning. But *National Parks* has long required more under the guise of its "substantial competitive harm" test. And what that "more" is varies widely by circuit. *See N.H. Right to Life*, 136 S. Ct. at 384-85 (Thomas, J., dissenting). As the Petition explains, two circuits consider the *possible* use of confidential information *itself* constitutes competitive harm, even if negative consequences are not likely to follow; three others (including the Eighth Circuit, Pet. App. 18a-20a) require a specific showing that the disclosing party would suffer a "defined competitive harm"—like lost market share—if competitors used its

15. *See, e.g.*, Doc. 59-13 at 7-8 ("The potential for SNAP redemption data to cause both competitive and reputational harm to the Kmart brand, and any future stores operated by Kmart, will be a major factor in Kmart's decision to continue participating in the SNAP program.").

confidential business information (Pet. 25-26). The circuits cannot even agree on what kind of "competition" must be shown—some will account for hypothetical future competitors, while others (including the Eighth Circuit, Pet. App. 17a) require evidence defining the relevant market in which the entity operates and establishing "actual competition" in that market, which the district court found satisfied in this case (Pet. 26-27).

The "substantial competitive harm" standard has thus sewn confusion in the courts of appeals. *N.H. Right to Life*, 136 S. Ct. at 384-85 (Thomas, J., dissenting). This case exposes the problems inherent in this "substantial likelihood of competitive harm" inquiry. The court of appeals here recognized that the data at issue made it more likely to make models predicting same-store sales more accurate, but denied that this enhanced precision was substantial enough to merit relief. (Pet. App. 5a.)

Nothing in the text of FOIA supports this sort of arbitrary line drawing. Here, the "likelihood of substantial competitive harm" standard enabled the Eighth Circuit to brush off compelling evidence that such real harm would occur—and order the disclosure of retailers' data where other circuits may well have held just the opposite. *See N.H. Right to Life*, 136 S. Ct. at 384 (discussing First Circuit standard holding that competitor's *possible* use of information alone constitutes harm); *Dep't of Interior*, 256 F.3d at 970 (Tenth Circuit rejecting requester's argument that "any effect of disclosure on th[e] competition would be negligible" and holding that documents were properly withheld under Exemption 4 because "evidence demonstrating the existence of *potential* economic harm is sufficient" (emphasis added)).

The record below illustrated in detail that determining where to site a retail food store is far from a precise science. While many sources of information are available to retailers, including firms which specialize in analytics such as market potential analysis, demographic, census, and customer profiling, store-level sales data, including SNAP redemption data, remains closely guarded, for good reason. Sales information is "the most important information ... in the decision whether to enter into a new market or not or buy a new store." (Doc. 185 at 171:2-5.) The government's release of SNAP redemption data is a "game-changer" (Doc. 186 at 17:21) that is "very, very dangerous fuel" in the marketplace (Doc. 185 at 254:21-255:3).

As the Food Marketing Institute ("FMI") explained, disclosure provides retailers "with valuable insights into the operational strengths and weaknesses of their competitors resulting in selecting pricing, market concentration, expansion plans and possible take-over bids facilitated by the knowledge [of the store-level SNAP data]." (Doc. 59-4 at 1-2.) Moreover, if a store's SNAP redemption data reflect a long-term trend of decreasing sales, "it would be reasonable for the competitors to extrapolate from that trend that the store is vulnerable and its market position weak," making it "more likely that the potential competitor would open a competing store in an area." (Doc. 59-8 at 3 (T. Gresham, CEO of Double Quick).)

Contrary to the Eighth Circuit's reasoning, it is *because* so much other information is readily available that the individual store sales data is so valuable. Injecting this additional piece of information—a competitor's store-

level SNAP redemption data—makes the predictive process for expansion into a particular market more accurate. (Doc. 119 at 26:8-9 ("I would say that from the perspective of market research, the more information you can get, the better.").) When inserted into predictive models that utilize other available information, store-level SNAP redemption data would improve the accuracy of what otherwise is often an educated guess. (Doc. 186 at 133:20-137:19.)

Bruce Kondracki, the USDA's expert and VP of Consumer Research at Dakota Worldwide Corporation,[16] explained how software-based predictive modeling for "repositioning" a retailer's stores in the market is at the cutting edge of industry research. High-tech modeling is premised on balancing the model's "demand side" with the "supply side"; while the demand side is relatively simple to calculate and "fairly predictable" (e.g., population, demographics, street and highway networks), the supply side "is, by far, the most time-consuming and most expensive part and most inaccurate part of the whole modeling process." (Doc. 186 at 128:11-132:6.) Store-level sales factor in the supply side, and "without [an] accurate supply side, you'll never balance the model." (*Id.* at 130:19-24.)

If researchers know the *precise* amount of a competitor's store-level sales, a research firm like Dakota (hired by a competitor retailer) can engage in reverse engineering by continually tweaking and re-tweaking the model's algorithms (using other known variables such

16. Dakota is one of the longest-serving market research firms serving the food industry. (Doc. 186 at 121:13-18.)

as demographics and income). (*Id.* at 134:3-135:9.) The updated model can then be used to predict *the client's* sales if it opened a store across the street. (*Id.* at 136:12-22.) The client can "then ... play God," searching an entire marketplace and testing possible expansion locations to determine what "a particular threshold for a store's sale performance" would be *before* pulling the trigger and breaking ground at that site. (*Id.* at 131:24-132:6.) Such enhanced models will result in greatly diminished risk for new market entrants. (*Id.* at 137:1-19.). It is for this reason that the industry so jealously guards against disclosure of this information.

At the same time, the dollar value of SNAP redemptions each of the quarter-million plus SNAP-authorized retailers across the country will not shed any additional light on what the *government* is up to. Argus Leader—and anyone with an internet connection—can already ascertain the aggregate dollar value of SNAP redemptions at the national, state, and even zip code level. (Doc. 118 at 42:14-21, 99:22-100:4.)

The Eighth Circuit's holding that Exemption 4 was not satisfied here only illustrates how far afield the lower courts have strayed from the statute's text. The government, supported by the industry, put on substantial evidence in an effort to meet an atextual "competitive harm" standard. That substantial evidence was deemed insufficient by the court of appeals, where other courts may well have reached a different conclusion on the same evidence. But puzzling over what constitutes "competitive harm" is entirely unnecessary. This Court should grant the Petition to restore Exemption 4 to its textual roots.

CONCLUSION

For the reasons stated herein and in the Petition, the Court should grant FMI's Petition for Writ of Certiorari.

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Respectfully submitted,

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